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MARITIME LIEN FOR DAMAGE.

A very remarkable divergence exists in the laws of different States as to the position, as a creditor, of one whose property has been damaged by negligent navigation of a ship. This divergence is found in the limit set to the liability of the owner of the delinquent ship, and also in the rank given to the claim for damage amongst other claims against that ship. Responsibility of an employer to third persons for negligence of his employees is a fundamental principle in most systems of jurisprudence. But where the employer is a shipowner, and the employees are the master and crew of his ship, that principle is not fully enforced. Occasionally we hear voices bold enough to urge that it ought to be swept away altogether.

Three systems of limiting a shipowner's responsibility are in force in leading Maritime States. One is that of confining the remedy of the person injured to a proceeding against the ship which has done the mischief, and her freight; so limiting the extent of the remedy to the value of that, as she stands, after first satisfying any prior claims against her. This prevails in Germany, Denmark and Norway.

A second system is that of France, Belgium, and States which have followed the French code, and also I understand of the United States, under which a personal claim may be made against the shipowner; but may be got rid of by him by abandoning the ship to the creditors, in whatever state

she may be, lost or not lost, after the collision which has given rise to the claim. The result is much the same as that of the first system.

The third method is that of Great Britain, under which the personal liability of the shipowner is recognized, regardless of the value of his ship, and of the results of the collision; but a limit of amount is set beyond which the liability shall not go, proportioned to the tonnage of his ship.

The two first systems seem to be historically traceable to the same source; to the idea which has been expressed in French by "La fortune de terre ne répond pas à la fortune de mer." It is recommended by antiquity, and has I presume grown out of reasons of policy—the policy of fostering maritime adventure. Whether that policy justifies such a limitation at the present day may be questioned. In England, opinion has been against it; and a different mode of limitation has been adopted; fixing a definite amount of liability, not to be cut down by any damage to or loss of the defendant's ship.

But beyond this variety of rules as to the amount of responsibility, there also exists a remarkable divergence as to the rank, amongst other claimants upon the ship, in which the damage-creditor stands. Here, again, the law of England stands in opposition to that of continental Europe. Speaking broadly, in England the damage-claimant ranks first against the fund provided by the sale of the delinquent ship; but on the Continent his claim ranks last, or nearly so. To show this, let us compare the codes of France and Germany with the maritime law as administered in the English Admiralty Court.

Article 191 of the *French Code de Commerce* defines eleven classes of privileged claims against the ship, which have priority in the order set out. The first five classes comprise legal costs, harbor dues and pilotage, and expenses of watching and preserving the ship, after reaching the port at which the sale takes place. We need not dwell upon these, as under any system they would no doubt form the first charge upon the net proceeds of sale.

Class No. 6 is wages of captain and crew during the last voyage.

No. 7, sums raised by the captain for necessaries during the last voyage, by loan or by sale of cargo.

No. 8 includes sums due for supplies and work done for the ship before her departure.

No. 9, sums raised on bottomry for repairs and supplies.

No. 10, premiums of insurance on the ship and her equipment during the last voyage.

Finally, No. 11, damages due to affreighters for default of delivery of goods, or for injury to the goods by the fault of the captain or crew.

Damages due to owners of another ship or cargo are not classified, and apparently come after all the foregoing.

In the Belgian Code (1879), Article 4, which follows the French Code very closely, such damages form a class 14, following class 13, which corresponds to the French No. 11. So that collision-creditors, as already said, come last.

Another curious omission in the French Code is that no place is given to the claims of salvors. These appear to be still governed by the Ordonnance of 1681, which gives the salvors one-third of the value of things found (*derelict?*) afloat or sunk; but only gives them expenses of saving in the case of a ship or effects cast on the shore. In the Belgian Code the omission is cured by an express category, No. 6, which includes salvage expenses and awards on the ship's last voyage.

Looking at this scheme as a whole, some justification seems required for a classification which postpones one who has suffered damage by the wrongful navigation of the ship to creditors for goods supplied to the ship, and even to insurers whose premiums of insurance remain unpaid. A partial explanation is that under the French Code (Art. 216) and Belgian Code (Art. 7) these creditors have only the ship and freight to look to. The ship-owner cannot be made liable for the acts and engagements of the master of the ship beyond the existing value of the ship and freight. This is most clearly expressed in the Belgian Code, of which Article 7 provides as follows:

"Tout propriètaire de navire est civilement responsable des faits du capitaine et tenu des engagements contractés par ce dernier, pour ce qui est relatif au navire et à l'expédition. Il peut dans tous les cas, s'affranchir de ces obligations pas l'abandon du navire et du frét."

Still it may well be questioned whether creditors who have been willing to be creditors of the ship, who are in a sense co-adventurers with the owner, ought to have priority to a claimant for damage done by the ship. Though their remedy is confined by the Codes to the ship, that is also true of his. They have accepted the position of creditors willingly; he has not. Their merit is that they enabled the ship to sail; but, as it turns out, they have done this to the detriment of the damage-creditor.

The German Code differs from the French in certain points, but agrees in ranking the damage claim last, or practically so. Article 754 defines certain classes of *Ship's Creditors*, who are allowed a lien on the ship, and her freight [unpaid, or in the master's hands (771)], which is enforceable against all third parties who may be in possession of her (755).

Claims relating to a later voyage have priority over claims relating to an earlier (767). But, after the expenses of watching and keeping the ship at her last port have been defrayed (759), claims which relate to the same voyage are to be paid in the following order (768):

(1) Port and other dues.

(2) Crew's wages.

(3) Pilotage; salvage; ship's contribution to General Average; bottomry, and other credit transactions entered into by the master in cases of necessity; including supplies furnished or services rendered to the master away from the port of registry, as master, and not on his personal credit, if required for the preservation of the vessel or for the performance of her voyage.

(4) Claims for non-delivery of or damage to cargo.

(5) Claims not included above for breaches of contracts by the owner, so far as the performance fell within the master's duties, and claims *arising out of fault of any member of the crew.*

Claims within the same group are to be on an equal footing; except that claims under No. 3 are to rank in the inverse order of their dates (769). Debts incurred by the master in consequence of one and the same case of necessity are considered to arise simultaneously (769).

To understand the significance of this system we must refer to Article 486, which provides that the shipowner is not personally liable, but is only answerable to the extent of ship and freight, where the claim is in respect of a transaction of the master done under his ordinary powers; or where it is in respect of a breach of a contract made by the owner, so far as the carrying out of the contract fell within the duties of the master, although the breach may have been caused through fault of one of the crew; or where the claim has arisen through fault of one of the crew.

Thus it appears that the creditors of the ship are generally confined to their remedy against the ship. And that damage-creditors are in the same position. But that these latter have to wait until creditors for wages, and supplies, and for breaches of contracts of carriage, have been paid in full. And this whether the damage-claim has arisen before or after these debts were incurred.

Let us suppose, for example, that during a voyage the master of ship A has obtained necessary supplies (say coal) at a port of call; has then collided negligently with ship B; and has then short delivered cargo to C. The law of Germany postpones the claims of B and B's cargo, strangers to A, to those of the coal-suppliers who intentionally gave credit to A, and also to the claims of C whose goods were voluntarily risked in A. As already remarked, in relation to the French Code, it may well be questioned whether this is a just rule.

Turning now to English law, the rules of priority are not settled by any statute; nor can they be stated in hard and fast categories. But they are sufficiently clear. Speaking generally, the broad rule is that claims which are charged upon the ship, or as it is expressed, which give rise to maritime liens, rank inversely to their order of date. The last comes first.

One ground for that rule is that claims for services which have conserved the *res* must come before earlier liens which have been preserved by those services. Another ground, which more especially touches the position of the damage-creditor, is that one who has a lien on a ship holds that subject to the chances of the ship's voyage, which may

give rise to fresh liens. The lien acquired by a member of the crew for his wages, or by a bottomry bond-holder, or by a salvor, on a ship still on her voyage, is a charge upon a ship in course of an adventure; not upon a ship in safety. Whether willingly or unwillingly the holder of such a lien has become a party to the adventure. There is, therefore, no injustice in postponing his charge to that of strangers who have subsequently suffered by negligent conduct of the adventure, as in the case of a collision for which that ship is to blame.

An exception to the general rule of inverse order of dates seems to have been set up in the case of wages earned after a collision. The rule would give priority to these over the damage-creditor. But, in certain cases of foreign ships, they have in England been postponed, on the ground that to prefer the wages would relieve the shipowner at the expense of the sufferers from the damage, who could only look to the ship.[1] Where, however, the seamen would be without an effective remedy against the shipowner, the question seems to be left open.

A good illustration of the general rule is afforded by the recent case of the *Veritas*,[2] tried by Gorell Barnes, J. The Norwegian steamer *Veritas*, in distress, was towed into the River Mersey by the *Caledonian*, and safely anchored. While there she was run into by the *Devonian*, and began to sink; and to prevent this two tugs brought her to a place alongside the dock wall, to the south of the Liverpool landing-stage. But from that place she drifted against the stage, doing damage to the boom and connections of the stage. She sank, but was raised and sold; and the question was as to the order in which the claimants against her should receive the proceeds, amounting to £927. On January 14, 1901, judgment had been given in favor of the tugs for £320 salvage and costs. On April 29th, judgment had been given in favor of the *Caledonian* for £400 salvage and costs. And on July 1st judgment was given in favor of the Mersey Docks and Harbor Board (owners of the landing-stage) for £600 damages and costs. But in each case the judgment

[1] The *Linda Flor* (1857) Sunbey 309; The *Elin* (1882) L. R. 8 P. D. 39; (1883) 129.

[2] (1901) P. 304.

reserved all questions of priorities against the fund in court, Gorell Barnes, J., decided that the damage claim of the Mersey Docks Board must rank first; then that of the tugs, the second salvors; and then that of the *Caledonian.* In his judgment, it is true, he spoke of a division of maritime liens into liens arising *ex delicto*, and liens arising *ex contractu* or *quasi ex contractu;* and he seems to have said that liens *ex delicto* take precedence, generally, over liens arising *ex contractu.* That, however, was not the decision in the case. And the reasoning of the judgment (p. 313) rather shows that it is only a *subsequent* lien *ex delicto* which ranks prior to a lien *ex contractu.* The judgment, there cited, of Dr. Lushington in the *Aline*[1] expressly recognized the prior right of the holder of a bottomry bond given after the collision.

Inverse order of dates, then, is the general rule as between competing claims, which are charged by maritime lien upon the ship. But, apart from contract, that is only true under English law, of claims which are so charged. A claim which gives rise to a maritime lien attaches to the ship and her freight as soon as it arises; and entitles the claimant to follow the ship though in the hands of transferees. Such claims may be divided into five groups:

1. Salvage; pilotage; towage.[2]
2. Damage done by the ship.
3. Wages of master and crew, including compensation for dismissal; and expenses of getting home, in the case of foreign seamen.
4. Master's "disbursements or liabilities properly made or incurred by him on account of the ship as master."[3]
5. Loans secured by bottomry of the ship.

In contrast with these claims we have others which can be enforced by admiralty process *in rem*, against ship and freight, but have not the *res* as a security until it has been arrested under the process. These are claims for necessaries supplied to any foreign ship, or to any ship of which

[1] (1839) 1 W. Rob. 111 at p. 118.

[2] Towage is doubtful; compare Westrup *v.* Great Yarmouth Co. (1889) L. R. 43 Ch. D. 241, with The *Constancia* (1846) 4 N. of C. 512, and The *St. Lawrence* (1880) L. R. 5 P. D. 250.

[3] M. S. Act 1894, s. 167.

no owner is resident in England or Wales; also claims for breaches of duty, or contract, on the part of the owner, master, or crew, unless an owner or part-owner is domiciled in England or Wales.[1] And under the County Court Acts[2] the same jurisdiction is given in all claims (below £300) for towage, or necessaries, or damage to cargo; or arising out of the use or hire of a ship; or in tort in respect of goods carried in a ship.

Such claims are on a different footing from those which are secured at once by lien upon the *res;* and the arrest under process cannot, it seems,[3] alter their position, so as to bring them into competition with existing liens. The arrest gives the creditor the security of the *res* so far as that then belongs to the debtor; but not more.[4]

The position of claims which are charged upon the ship *by contract,* simply, stand in a position intermediate to the first group, giving rise to maritime liens, and the second group, enforceable *in rem.* Thus, a mortgage of a ship cannot compete with a maritime lien. The mortgagee is an assignee of the owner's rights of property who has left the owner in possession of the ship, with liberty to adventure her. He cannot override the liens which have in consequence fallen upon her. On the other hand, his claim to the ship is superior to that of one who has only acquired a charge by taking her in execution, whether after judgment or before judgment, by process *in rem.*[5]

The same is true of one who has acquired a possessory lien on the ship, as a ship-repairer. His lien does not override an earlier maritime lien; except, perhaps, to the extent to which he has added value to the ship. On the other hand, it does override claims enforced *in rem* after she came into his possession.[6] And also it ranks before claims for wages, to which he is no party, which may accrue after that date; although they may be charged by maritime lien.[7]

[1] Admiralty Court Acts 1840 and 1861. [2] 1868 and 1869.

[3] See however the opinion of Gorell Barnes, J., in the *Veritas* (1901) P. at p. 314.

[4] The *Cella* (1888) L. R. 13 P. D. 82. The Two *Ellens* (1872) L. R. 4 P. C. 161, The *Aneroid* (1877) L. R. 2 P. D. 189.

[5] The *Pacific* (1864) 32 L. J. Ad. 120.

[6] The *Gustaf* (1862) 31 L. J. Ad. 207.

[7] The *Turgeste* (1902) P. 26.

The position of one who has a possessory lien as against prior chargees may, however, depend upon whether they have expressly or impliedly authorized the acts which have given him his lien.

Thus, leaving out cases of possessory liens, creditors of the ship under English law fall into three classes:

(*a*) Those having maritime liens.

(*b*) Those having charges on the ship by contract, or assignment.

(*c*) Those having a remedy *in rem*, which has been enforced by suit.

Of these (*a*) rank among themselves in inverse order of date; (*b*) rank among themselves in direct order of date; and (*c*) stand on an equal footing with one another, without reference to the order in which the suits have been begun, until an unqualified decree has been obtained. Where such a decree has been given the creditor obtaining it ranks first against the fund available to (*c*).[1]

This arrangement no doubt seems complicated, but that lies in the nature of the matter itself. Looked at as a whole it follows intelligible lines of principle; and it is free from some elements of arbitrariness and injustice which we have noted in the French and German systems. The result is to put the damage-claimant in a much better position than he occupies under those systems.

This diversity of laws as to ship's creditors is one of the subjects which have been taken in hand recently by the International Maritime Committee. That Committee is an unofficial association of representatives from the maritime States, working in conjunction with national associations or committees in those States. Its object is unification of maritime laws. It has held several conferences which have been engaged upon Collision and Salvage law. The subject of charges upon ships has been reported upon by the National Associations, and was set down for discussion at the Conference of the Committee held in September, 1902, at Hamburg, but for want of time it could not then be dealt with, and it stands over for the next Conference.

[1] The *William F. Safford* (1860) 29 L. J. Ad. 109.

Uniformity of law on this matter is much to be desired. It is quite unsatisfactory, from the point of view of the lawyer, as well as of those practically concerned as creditors, that the remedy available should vary according to the port in which the ship happens to be, whether as her destination, or as a port of distress. And, but for the rather fundamental difference of views as to the relationship between shipowners and their creditors, which has been indicated above, it ought to be easy for the various maritime States to agree upon rules suitable for general adoption. It remains to be seen whether the differences are too serious.

The method of the International Maritime Committee will be to formulate a draft convention on the subject, and to seek to have this considered by a conference of representatives of the maritime Powers. If such a conference were to approve the draft, or some modification, it would doubtless take the form of a treaty among the agreeing Powers, and would be followed in due course by legislation in the several States to bring the law in each State on to the agreed lines.

This course is being followed in the case of Collision and Salvage law. Drafts of conventions on these subjects were adopted by the Committee at the Hamburg meeting, and have now been brought before the Governments of the other maritime States by the Government of Belgium. Before long, it is hoped, they will be considered by a conference of representatives of those Governments; and upon that, important steps towards uniformity of law on those subjects should result. Each such step is a gain. And if efforts of the kind are persisted in, we may hope that by degrees the discords of our maritime laws may be taken away.

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